

**STATE PERSONNEL BOARD, STATE OF COLORADO**  
Case No. 95B103

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**  
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FREDERICK C. YOUNG,

Complainant,

vs.

DEPARTMENT OF STATE,

Respondent.

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Hearing was held on April 4, 1995, in Denver before Margot W. Jones, administrative law judge (ALJ). Respondent appeared at hearing through Mark Gerganoff, assistant attorney general. Complainant, Frederick Young, was present at the hearing and represented by James R. Gilsdorf, attorney at law.

Complainant testified in his own behalf and called Ken Allikian, an employee of the Department of Personnel (DOP), to testify at hearing. Respondent called the following employees of the Secretary of State's Office (the office), Department of State, to testify at hearing: Vickie Buckley; Karen Jackson; Joseph Estrada; and Johanna Billmeyer.

Complainant's exhibits B, F, H and K were admitted into evidence without objection. Complainant's exhibits L, M and N were admitted into evidence over objection. Respondent's exhibits 2, 3, 6 and 7 were admitted into evidence without objection.

**MATTER APPEALED**

Complainant appeals the abolishment of his position as a criminal investigator with the Department of State, Secretary of State's Office, due to a reorganization.

**ISSUES**

1. Whether there was a bona fide reorganization of the Secretary of State's Office.
2. Whether the decision to abolish Complainant's position was arbitrary capricious or contrary to rule or law.
3. Whether Complainant is entitled to an award of attorney fees and costs.

## **PRELIMINARY MATTERS**

1. Complainant's request to sequester the witnesses from the hearing was granted.

2. On March 30, 1995, Respondent moved for summary judgment. Respondent contended that there were no disputed issues of fact between the parties and judgement should be entered for Respondent as a matter of law. At hearing on April 4, 1995, Complainant responded to the motion arguing that there were disputed issues of fact between the parties and that summary disposition of this matter was not appropriate. Complainant further argued that the motion for summary judgment should be denied because it was not timely filed.

Respondent's motion for summary judgment was denied. It was determined that based on the parties' prehearing statements and arguments made at hearing, there appeared to be numerous disputed issues of material fact and therefore summary disposition of this matter was not appropriate.

3. On April 4, 1995, Respondent moved to limit the evidence that Complainant would be permitted to offer at hearing. Respondent argued that the instant appeal pertains to Respondent's decision to lay off Complainant due to a reorganization. Respondent maintains that the evidence should be limited to exclude evidence related to events occurring prior to September 23, 1994, and after March 3, 1995. Respondent argued that evidence offered about events occurring prior to or after these dates is irrelevant to the issue whether the reorganization and lay off was arbitrary, capricious or contrary to rule or law.

Complainant opposed the motion in limine. Complainant argued that Respondent's decision to reorganize the office and lay off Complainant was arbitrary, capricious and contrary to rule and law, and evidence concerning events before September 23, 1994, and after March 3, 1995, is irrelevant. Complainant argued that the case needs to be viewed in its totality and to do so requires evidence of events prior to and after these dates.

Respondent's motion in limine was denied. Evidence about events prior to September 23, 1994, and after March 3, 1995, was deemed to be relevant to the issue whether the reorganization and lay off was arbitrary, capricious or contrary to rule or law.

4. Ken Allikian, a DOP employee, was qualified to testify at hearing as an expert in the field of job classifications and position description questionnaires.

95B103

## **FINDINGS OF FACT**

1. Complainant, Frederick Young, began his employment with the Secretary of State's Office, in April, 1989, as an investigator. Prior to Young's employment with the office, he was employed as a criminal investigator with a sheriff's department for four years and with the Arapahoe County District Attorney's Office for 14 years.

2. At the office, Young conducted investigations into the operations of bingo and raffle licensees. Young audited the operation of bingo and raffle businesses to determine whether the gaming halls were in compliance with State law.

3. In April, 1989, there were four investigators in the office. In December, 1991, two additional investigator were hired. All the investigators performed the same duties. Joseph Estrada was a working supervisor. He supervised the investigators while performing the duties of an investigator. Johanna Billmeyer was the second level supervisor.

4. In October, 1990, Young was assigned to work on an investigation. By 1992, it was determined that the bingo licensee Young investigated may be involved in embezzlement. In July, 1992, Natalie Meyer, the Secretary of State at that time, met with officials of the Colorado Bureau of Investigation (CBI) for the purpose of working out a job sharing arrangement with regard to this investigation. It was determined that the needs of the agencies were best served by having Young assigned to the CBI office to work on the investigation.

5. Beginning in July, 1992, Young was directed to report to the CBI offices on a daily basis. Young was advised that he would be required to contact his immediate supervisor, Estrada, on a daily basis to advise him of the progress of the investigation. Young was further advised that Estrada would continue to be responsible for his job performance evaluations and for approval of sick and annual leave.

6. Young was on special assignment working out of the CBI office from July, 1992, to January, 1994. During the special assignment, Young performed duties traditionally assigned to the criminal investigator job classification. Young testified before the grand jury and in district courts, county courts and administrative hearings on numerous occasions in connection with the investigation he participated in while on special assignment to CBI. Young made recommendations to statewide law enforcement and district attorney offices about potential criminal targets, interviewed victims and suspects, and performed financial investigations by standard and complex audits of bank records or information seized by warrant or subpoena.

**95B103**

7. In May, 1993, Young was advised by his second level supervisor, Billmeyer, that DOP was conducting a statewide audit of job classifications. Every State employee was required to complete a position description questionnaire (PDQ). The PDQ was a total of 15 pages in length. At page 1, the PDQ instructed the supervisor of the position for which the questionnaire was completed that,

... THE SUPERVISOR IS RESPONSIBLE FOR THE ACCURATE  
COMPLETION OF THE QUESTIONNAIRE.

The PDQ at page 1 further instructed the employee and supervisor to,

Focus on the POSITION. This document describes a position, not an employee's qualifications or performance. Concentrate on current, normal, daily duties and responsibilities -- not unique events.

At page 3 of the PDQ the questionnaire instructed,

DO NOT LIST PROCEDURES, TEMPORARY OR OCCASIONAL DUTIES,  
PAST OR FUTURE DUTIES, OR FILL IN DUTIES DONE  
IN THE ABSENCE OF ANOTHER EMPLOYEE.

8. At pages 7, and again at page 8 of the PDQ, the employee was asked to give examples of the guidance available and the type of challenges or problems assigned, the instructions repeatedly state,

Give specific examples from the last 12 months.

9. The questionnaire directed the supervisor to indicate whether he/she was in agreement with the employee's statement of duties. The PDQ instructed the supervisor to make written comments if there was disagreement with the employee's statement of duties.

10. In June, 1993, Young was contacted by Estrada and advised that he was required to submit the PDQ form the following day. Young quickly completed the form. In June, 1993, he had been on special assignment for 11 months. The PDQ was prepared to reflect the work he performed during the preceding 11 month period while on special assignment at CBI.

11. Young's PDQ was different from the PDQ's submitted by the other investigators in the office. The other investigators described job duties related to the investigation of bingo and raffle licensees.

95B103

12. Young submitted the PDQ to his supervisor, Estrada, leaving it on his desk the following morning. Estrada reviewed the PDQ. He did not agree with Young's statement of duties. Estrada did not believe these duties were usual or normal. Estrada knew that when the special assignment at CBI ended, Young would return to the duties normally assigned investigators in the office.

13. Estrada did not complete his portion of the PDQ reflecting his disagreement with Young's statement of duties. He signed the form without comment. The PDQ was then reviewed by Billmeyer. Billmeyer informed Estrada that she did not think the form was properly prepared. Billmeyer advised Estrada that the employee should not include in the PDQ form temporary or specially assigned duties.

14. Billmeyer signed Young's PDQ, and commented in bold print on the cover page of the PDQ form:

PLEASE NOTE: The PDQ accurately reflects the duties of this position for the preceding year and the current year. It does/may NOT reflect the position before that time or in the future. This position is unique at present because it is "on loan" to the C.B.I. to aid in bingo-raffle related prosecution.

15. On the last page of the PDQ by the supervisors' signatures, Billmeyer commented again:

NOTE: \* This description is accurate for the last year of work for this individual only, not for the position! Unique circumstances lead to assignment of one investigator to C.B.I.

The asterisk referred the reader to see the comment on the cover page.

16. The PDQ's were sent to the human resources office and then to DOP classification section. Young's PDQ was reviewed by a panel, along with the PDQ's of the other five investigators in the office. PDQ review panels were comprised of five people. The panel reviewing the PDQ's for the investigator positions was made up of the human resources representative from the office, Karen Jackson, and employees of the DOP classification section.

17. Jackson tried to explain to the panel that Young's description of duties described specially assigned duties and that Young normally performed duties like those of the other investigator. It was the practice of a panel reviewing the PDQ's

95B103

to refer the PDQ back to the agency for further comment and clarification, if there was disagreement between the employee and supervisor's statement of duties or if there were other irregularities. However, when Young's PDQ was reviewed by the panel, the PDQ process was drawing to a close and the panel wanted to complete its assigned task, so this procedure was not followed.

18. Despite Jackson's efforts to inform the panel of Young's special circumstances, and the comments on the PDQ from Billmeyer, the panel decided to classify Young as a criminal investigator. The panel classified the five other employees who investigated bingo and raffle licensees as investigators.

19. Young received notice of the classification decision on September 23, 1994. Young was surprised that he was not classified the same as his co-workers. He consulted with Jackson to determine what his rights were with regard to this decision. Consistent with the instructions provided in the September 23, notice, Jackson advised Young that he had three options. He could request another evaluation after statewide classification placement was completed in January, 1995, request reconsideration if the PDQ was inaccurate or incomplete or appeal the decision in writing to the State Personnel Director.

20. Jackson advised Young that the approach likely to bring about the best result would be to wait until the new classification became effective in January, 1995, and request another evaluation. Young was lead to believe that he would not waive any rights by electing this option.

21. Vickie Buckley was elected to the position of Secretary of State in November, 1994. Soon after taking office, on January 10, 1995, she decided to reorganize the office. Buckley wanted the office oriented toward educating the public and to apply principles of "total quality management" (TQM). At Buckley's request, Jackson supplied her with the PDQ's for the office's 88 employees and with information concerning the procedures to be followed in a lay off. Buckley reviewed this information in order to make her decision how to reorganize the office.

22. Buckley sought no advice, and no manager in the office offered advice, about her plans to reorganize.

23. Jackson was aware that Young's classification as a criminal investigator was an aberration which evolved out of the massive task of reviewing all classifications in the state system. She was also aware that it was Young's intent, in January, 1995, to seek reevaluation of his position. Estrada and Billmeyer, as Young's immediate supervisors, were aware that, in January, 1995, Young was performing the same duties as the five other investigators under their supervision.

95B103

24. Following a review of the PDQ's, Buckley decided to abolish two positions. Buckley abolished Young's position and the position of a research assistant. Buckley concluded that the office had no need for a criminal investigator. The research assistant position was filled by an attorney who offered legal advice. Buckley concluded that the office received adequate legal representation from the attorney general's office and did not need the research assistant position.

25. After the lay off, with the elimination of Young and the research assistant's positions, there were 86 full time employees. The fundamental structure, positions and functions accountable to Buckley, as the appointing authority for the office, did not change as a result of the reorganization.

26 Buckley adopted and posted in her office a reorganization plan. It stated,

Organizing and Refocusing  
for  
Quality Customer Service

It is imperative that the Department of state function in the most cost-effective, efficient manner possible and eliminate overlapping employee functions. A thorough review of all operational procedures, employee attitudes, and the quality of services offered to each constituent group has resulted in the development of a reorganization plan.

The vehicle to effectively achieve what is necessary in the Department of State is "Total Quality Management" (TQM). TQM is a quality improvement process through which the development and implementation cause major organizational culture change. It comprises significant change at all organizational levels for behavior, attitudes, and expectations. Employees at all levels will be retrained in better ways of doing their jobs (not just doing right, but doing the right things right), while provision of quality customer service ascends their priority lists.

Additionally, customers' needs and perceptions drive organization activity, thereby improving inter-unit cooperation and coordination, and all agency policies and programs reinforce a "customer focused" culture.

Finally, through this reorganization, the Department of State shall continue to look for ways to make improvements throughout, anticipate legislation impacting staff resources, constituents, fiscal abilities, and the general public' (sic) and works with all divisions and staff to assure that operational improvements occur according to predetermined schedules and objectives.

95B103

27. Buckley also prepared an organizational chart. (Respondent's exhibit 6.) There were eight units in the office before the reorganization. They were: the computer systems; administration; human resources; commercial recordings; election/licensing; legislative inter-action; compliance/enforcement; and statutory/constitutional complaints. All units reported to the secretary of state through the deputy secretary of state.

28. As a result of the reorganization, the office was reduced to five units performing the same duties and functions as were previously performed. The units reported to the secretary through the deputy secretary of state. The new units were: administration; computer systems; commercial recordings; licensing and enforcement; and elections. The unit, previously referred to as human resources, was placed in the administration unit. The statutory/constitutional complaints and legislative interaction units were eliminated.

29. Under the old organization, the investigators were in the compliance/enforcement unit. Under the new organization, the investigators were in the licensing and enforcement unit. Estrada continued to function as a working supervisor. In the new organization the five remaining investigators performed the same amount of work with fewer investigators.

30. Buckley gave Young notice on January 18, 1995, that his position would be abolished effective March 3, 1995.

31. On January 27, 1995, with Jackson and Buckley's knowledge, Young requested reevaluation of his position as a criminal investigator. Young completed the PDQ and gave it to Jackson. Jackson was aware on January 27, 1995, that the PDQ submitted by Young was incomplete. Young submitted pages 2 through 9 of the 15 page PDQ document. Additionally, the PDQ lacked the signatures of Young and his supervisors.

32. Jackson held the incomplete PDQ for 11 days and then forwarded it to DOP on February 7, 1995. On February 8, 1995, DOP personnel advised Jackson by telephone that Young's PDQ was incomplete. On February 10, 1995, the PDQ was returned to Jackson, with a memorandum explaining what was missing. On February 9, 1995, Young signed the PDQ and the additional pages of the form were included.

33. Realizing that Young's lay off was effective on March 3, 1995, Jackson consulted an assistant attorney general for legal advice. At the direction of the attorney, Jackson sent the PDQ to the attorney general's office. The PDQ was held by the attorney from February 9, 1995, to March 13, 1995. When the PDQ was returned to Jackson, she obtained Estrada and Billmeyer's

95B103



signatures, on March 13, and sent the completed form to DOP.

34. From January 27, 1995, through March, 1995, Jackson kept Buckley apprised of the progress of Young's PDQ reevaluation.

35. Shortly after March 13, 1995, DOP advised Jackson that the reevaluation would not be completed because the position for which reevaluation was sought had been abolished and the incumbent laid off on March 3, 1995.

95B103

## DISCUSSION

A certified state employee has a right to appeal the appointing authority's decision to abolish that employee's position and lay the employee off. Section 24-50-125.5, C.R.S. (1988 Repl. Vol 10B). At hearing, the employee who has been laid off has the burden of proof to establish that the decision to lay him off was arbitrary, capricious or contrary to rule or law. Renteria v. Colorado State Personnel Board, 811 P.2d 797 (Colo. 1991). A presumption of regularity attaches to the many administrative decisions made on a daily basis by State agencies. Chiappe v. State Personnel Board, 622 P.2d 527, 532 (Colo. 1981). However, arbitrary and capricious action is shown when it is established that the appointing authority has not given candid consideration to the evidence, neglected or refused to procure evidence or has exercised discretion based on the evidence in such a way that reasonable people must reach a contrary conclusion. Van de Vegt v. Board of Commissioners, 55 P.2d 703, 705 (Colo. 1936).

The only reasons for a lay off are lack of funds, lack of work, or reorganization. R9-3-1. The facts established at hearing were that the Secretary of State's office was not lacking in funds or work. It was Buckley's testimony that she wanted to rearrange the office so that it was oriented toward educating the public and to incorporate TQM principles. Therefore, she consulted the rules pertaining to a reorganization. The relevant rule provides,

. . .

A reorganization, when not caused by either lack of funds or lack of work, must require changes to the fundamental structure, positions, and/or functions accountable to one or more appointing authorities.

In the case of a reorganization, when not caused by either lack of funds or lack of works, a written plan of reorganization shall be developed. The plan shall include a chart of the organization, the reasons for the changes, the anticipated benefits and results, and at least in general terms, the expected changes and their effects on employees. The written plan shall be posted in a conspicuous and accessible place at the work site for a period of at least 45 days beginning with the first notice of layoff pursuant to the plan.

R9-3-1.

Based on the evidence introduced at hearing, the plan adopted by

95B103

Buckley fails to meet the requirements of R9-3-1. The plan does not explain the reason for the changes to the organization. Nor does the plan, even in general terms, include the expected changes and the effects of these changes on employees.

The reorganization plan, along with the new organizational chart, described a plan where the office would be reduced from 88 full time employees to 86. However, the plan fails to explain the reason the investigator position was abolished or the effect that the abolishment of the position would have on employees in the office.

Buckley knew that Young's job classification as a criminal investigator was a mistake for which Young was seeking reevaluation in January, 1995. Estrada testified that his section of investigators continued to perform the same duties for the office. He testified that after the lay off the investigators performed the same quantity of work with fewer investigators to perform that work.

The evidence further established that the reorganization did not change the fundamental structure, positions or functions accountable to Buckley. All the units in existence prior to January, 1995, continued in existence after January, 1995, with the exception of the statutory/constitutional complaints and legislative inter-action units. These units, as they are shown on the organizational chart prior to January, 1995, do not reflect that personnel were assigned to them. Furthermore, if these units had a function prior to January, 1995, Buckley's statement justifying the reorganization does not explain why these units were abolished. Implementation of TQM principles and customer education orientation does not explain these organizational changes.

Even if one were to conclude that the appointing authority complied with R9-3-1, and a bona fide reorganization was implemented, the facts established that Complainant was wrongly classified and should never have been subjected to a lay off. Complainant's classification error was the product of a large bureaucracy which was attempting to function for the greater good.

Safeguards existed in the PDQ process to avoid harming individual employees. Yet, in this case every safeguard which was in place was overlooked, thoughtlessly circumvented or intentionally ignored.

Complainant was among the first group of four investigators hired by the office in 1989. In 1991, two additional investigators were hired. If one concludes a bona fide reorganization occurred, and the number of investigators in the office should have been reduced by one, clearly, Complainant's position would not have been the position eliminated.

95B103

Section 24-50-125.5, C.R.S. (1988 Repl. Vol. 10B) of the State Personnel System Act provides for the recovery of attorney fees and costs upon a finding that the personnel action from which the proceeding arose was instituted frivolously, in bad faith, maliciously, or as a means of harassment, or was otherwise groundless. Given the findings and conclusions contained herein, an award of attorney fees and costs is warranted.

#### **CONCLUSIONS OF LAW**

1. The evidence presented at hearing established that the reorganization implemented in the Secretary of State Office in January, 1995, was not bona fide.
2. The reorganization, abolishment of Complainant's position and Complainant's lay off was arbitrary, capricious and contrary to rule and law.
3. Complainant is entitled to an award of attorney fees and cost because the personnel action from which this appeal arose was frivolous, taken in bad faith, malicious and otherwise groundless.

#### **ORDER**

Respondent is ordered to reinstate Complainant to the position he held prior to March 3, 1995. Complainant shall be awarded full back pay with interest and benefits, with the appropriate offset as provided for by law. Complainant shall be awarded attorney fees and cost.

DATED this \_\_\_\_\_ day of  
May, 1995, at  
Denver, Colorado.

\_\_\_\_\_  
Margot W. Jones  
Administrative Law Judge

95B103

**CERTIFICATE OF MAILING**

This is to certify that on this \_\_\_\_\_ day of May, 1995, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

James R. Gilsdorf  
Attorney at Law  
1390 Logan Street, Suite 402  
Denver, CO 80203

and in the interagency mail, addressed as follows:

Mark W. Gerganoff  
Assistant Attorney General  
Department of Law  
General Legal Services Section  
1525 Sherman Street, 5th Fl.  
Denver, CO 80203

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95B103

### NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties and advance the cost therefor. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

### RECORD ON APPEAL

The party appealing the decision of the ALJ - APPELLANT - must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is \$50.00. The estimated cost to prepare the record on appeal in this case with a transcript is \$724.00. Payment of the estimated cost for the type of record requested on appeal must accompany the notice of appeal. If payment is not received at the time the notice of appeal is filed then no record will be issued. Payment may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. If the actual cost of preparing the record on appeal is more than the estimated cost paid by the appealing party, then the additional cost must be paid by the appealing party prior to the date the record on appeal is to be issued by the Board. If the actual cost of preparing the record on appeal is less than the estimated cost paid by the appealing party, then the difference will be refunded.

### BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief.

An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 Code of Colo. Reg. 801-1.

### ORAL ARGUMENT ON APPEAL

95B103

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 Code of Colo. Reg. 801-1. Requests for oral argument are seldom granted.

#### **PETITION FOR RECONSIDERATION**

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 Code of Colo. Reg. 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

**95B103**